

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Certificate of Authority  
of Capitol American Life Insurance  
Company, an Arizona Corporation, to do  
Business in the State of Minnesota, and  
its Officers and Directors

**THIRD PREHEARING ORDER**

This matter is before Administrative Law Judge Steve M. Mihalchick on the Department's Motion to Compel and Capitol American's Amended Motion to Strike. A hearing was held on these motions on November 14, 1997, at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota.

Timothy D. Webb, David M. Aafedt, and James P. Jacobson, Assistant Attorneys General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Commerce (Department). Curtis J. Dickinson, Attorney at Law, Dickinson & Abel, 8900 Keystone Crossing, Suite 1095, Indianapolis, Indiana 46240, and Thomas E. Harms, Attorney at Law, Hessian, McKasy & Soderberg, 4700 IDS Center, 80 South 8th Street, Minneapolis, Minnesota 55402-2228, appeared on behalf of Capitol American Life Insurance Company, its officers and directors (collectively referred to as "Capitol American" or "Respondent").

Based upon the record herein, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

1. Capitol American's Amended Motion to Strike is DENIED.
2. Capitol American shall respond to the Department's Interrogatories and Request for Production of Documents by December 31, 1997, as follows:
  - a. for Interrogatories 2, 29 and 30, the agent files from January 1, 1992, to July 15, 1997, in a format usable by the Department;
  - b. for Interrogatory 3, in full;
  - c. for Interrogatory 4, in full, either by preparing the data to identify Minnesota payments or by providing all information about payments to Inter-State, after January 1, 1992;

- d. for Interrogatories 15 and 16, by providing the claim denial letters from 100 files as identified by the Department;
- e. for Interrogatory 17, in full;
- f. for Interrogatories 19 and 20, in full, including any information obtained by inquiring for copies from Inter-State and preparing an itemized list of documents not found, lost, or destroyed;
- g. for Interrogatory 22, in full;
- h. for Interrogatories 31 and 33, in full; and
- i. all interrogatory answers shall be signed by an officer or managing agent of Capitol American as required by Minn.R.Civ.P. 33.01(d).

Dated this        th        day of    December        1997.

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STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

### Amended Motion to Strike

Capitol American moved to strike the Notice of and Order to Show Cause in this matter on the ground that the Department had not identified the basis in fact for any of its allegations. The Department responded to this motion in two discrete ways. First, the Department identified facts in its motion briefs responding to the claimed inadequacies. Second, the Department issued an Amended Notice of and Order to Show Cause restating its allegations against Capitol American and better supporting those allegations.

A comparison of the allegations in the original and amended Notices shows what has been retained and which allegations have been dropped, as follows:

<u>Original Notice</u>	<u>Amended Notice</u>
I. Agent Identification	Counts VI and VII
II. Suitability Violations	Count VIII
III. Unfair or Deceptive Acts	Counts I, III, IV, and V
IV. Failure to Disclose Limitations	Count IX

V. Failure to Identify Product	Count VII
VI. Misuse of Certificate	Count X
VII. Improper Use of Endorsements	Dropped
VIII. Recruiting Practices	Dropped
IX-XIII. Multi-State Penalty	Count XVI
XIV. Commissions to Unlicensed Entity	Count XIII
XV. Failure to Disclose Limitations	Count II
XVI. Failure to Make Disclosures	Count II
XVII. Failure to Control Agent Representations	Count XI
XVIII. False Loss-Ratio Claims	Dropped
XIX. Threat for Contacting Agency	Count XV
XX. Coercion of Agent	Count XV
XXI. Guaranty Assoc. Limitations	Count XIV

No analysis of the dropped charges (Original Counts VII, VIII, and XVIII) is needed, since the Department is, in effect, voluntarily striking those counts. Other counts (Amended Counts XII and XVII) are new, and while not expressly included in Capitol American's Motion to Strike, those counts are considered as subject to the motion as a matter of efficiency. The remaining counts are identifiably linked to charges in the original notice and are assessed to determine if they should be stricken.

Amended Counts I, III, IV and V assert that Capitol American, through its agents, made misrepresentations about Capital American's Compcare policy, used irrelevant statistics in its sales presentations, suggested the policy was similar to a disability or worker's compensation policy, and falsely claimed the policy was available for a limited time or as a special offer. The Department claims that Amended Count I is supported by paragraphs 1 through 28 in its Amended Notice.

Paragraphs 1 through 6 set out factual allegations concerning Capital American's authority and relationship with Inter-State Services, Inc. Paragraphs 7 through 9 set out the manner in which the Department alleges that Capitol American advertised the Compcare policy, trained agents to sell the policy, and organized its marketing of that policy. The standards an insurer must meet in advertising are set out in paragraphs 10 through 12. The Department's allegations regarding specific claims made in marketing the policy, including quotes taken from sales scripts, training materials, and advertisements, are set out in paragraphs 13 through 15, 17, 20, and 22. Paragraphs

16, 18, 19, 21, 23 and 24 explain the relationship of the facts alleged to the rules Capitol American is alleged to have violated. Beginning with paragraph 25, the Department sets out the counts it is bringing against Capitol American.

Regarding factual support for Amended Count I, the claim of support in paragraphs 1 through 28 is overbroad. Nevertheless, it can be easily discerned that paragraphs 13 through 15, 17, 20, and 22 set out specific allegations of facts that support the claim that Capitol American made misrepresentations as to the coverage provided by the Compcare policy in the manner alleged to violate the standards cited in Amended Count I.

Amended Count II alleges that Capitol American failed to disclose accident policy limitations in its advertising, sales scripts, and marketing presentations by agents. Paragraphs 20 through 22 specifically address this charge. Specific claims made by policyholders are set out in paragraph 20 and the exclusion statement is quoted in paragraph 22, both supporting the allegation in Amended Count II.

Amended Count III alleges that Capitol American used irrelevant statistics in its sales materials and presentations. Facts supporting this charge are alleged in paragraph 17 of the Amended Notice. The reasoning as to why the charge is appropriate is set out in paragraphs 18 and 19.

Misrepresentation of the Compcare policy as a substitute for a disability or worker's compensation policy is alleged in Amended Count IV. The Department quotes advertisements and sales scripts attached to the Amended Notice as exhibits to support this charge. The quoted language expressly identifies "non-medical costs of accidents" as language in Capitol American's sales materials. Amended Notice, at 13. The quoted language supports the charge in Amended Count IV.

Amended Count V asserts that the sales materials used to market the Compcare policy falsely implied that the policy was being offered for a limited time or as a special offer. The Department quotes an advertisement, sales scripts, and an agent's statement in a sales presentation in support of this charge. While the language does not specifically use words that demonstrate the charge, the context in which that language was used could constitute a violation of Minn. Rule 2790.1200, subp. 1, which prohibits falsely representing an offer of insurance as being available for a limited time.

The Department alleges in Amended Count VI that agents for Capitol American were trained to use general statements as to why the agents were talking to prospective customers, rather than identify themselves as insurance agents and identifying the insurance company they worked for. Specific language in sales scripts is quoted to support the charge.

Amended Count VII asserts that Capitol American agents referred to Compcare by terms that did not include the information that Compcare was a policy of "insurance." As an example, the Department refers to an attached sales script and asserts that at no place in that script is Compcare referred to as an "accidental injury insurance policy." Amended Notice, at 17. While that is true, the script does use the phrase "accidental injury insurance program." Amended Notice, Exhibit 2, at 17. Since the issue cannot be decided as a matter of law on the facts presented, the Motion to Strike on this charge

must be denied because the allegations are certainly clear enough to raise an issue for the hearing.

The Department alleges in Amended Count VIII that Capitol American marketed the Compicare policy without having reasonable grounds that believe that the product was suitable to the customer. In support of this charge, the Department alleges that sales scripts left no opportunity for agents to inquire into suitability, the agents were trained to overcome objections rather than assess the need demonstrated by the customers for the policy. When the script was amended, the Department asserts that the sales scripts undermined the instructions to inquire into objections as to insufficient money to pay for the policy. Amended Notice, at 18. Specific language from sales scripts is quoted that supports those allegations.

Amended Count IX asserts that Capitol American misrepresented the level of benefits payable by failing to adequately identify the limitations of the Compicare policy. Specific language in the sales scripts is quoted to support the charge. The provisions of the policy are contrasted with the sales language to demonstrate that customers were likely to have been misled.

The Department alleges in Amended Count X that the Certificate of Authority held by Capitol American was misused as an endorsement from the State. The Department quotes a sales script used in training agents and marketing policies. The Department also notes that agents were directed to include a copy of the Certificate in their sales materials between January, 1992 and January, 1995. Adequate facts have been alleged to support this charge.

In Amended Count XI, the Department alleges that Capitol American failed to maintain a system of control over its agents in violation of Minn. Rule 2790.2100, subp. 1 (1995). Capitol American's lack of a written policy and absence of a disciplinary program prior to 1996 are cited as evidence supporting this charge. The specific complaints against one agent and alleged failure of Capitol American to respond to those complaints are also cited as evidence supporting the charge. There are sufficient facts cited to defeat Capitol American's Motion to Strike.

Amended Count XII alleges that Capitol American appointed Inter-State as its Minnesota insurance agent while Inter-State lacked a license to sell insurance. This charge was not expressly contained in the Original Notice, but is similar to Original Count XIV. The factual basis for this charge is not expressly set out in the paragraphs discussing the charge (paragraphs 100-104). Paragraph 4 alleges that Capitol American and Inter-State entered into a "Marketing Agreement" on December 10, 1989, retroactive to March 1, 1989. The Department alleges that the Marketing Agreement designates Inter-State as Capitol American's "exclusive agent 'to solicit applications for insurance' in seventy-eight (78) counties in the State of Minnesota." Amended Notice, at 2. Capitol American acknowledges there was a contract with Inter-State, but disputes whether Inter-State acted as an agent. This is a legal-factual dispute that must be resolved at hearing.

The Department alleges that Inter-State's receipt of commissions while lacking a license to sell insurance is a violation by Capitol American of Minn. Stat. § 60K.14, subd. 3 (1996). That statutory provision states:

Subd. 3. Commissions or compensation. No commission or other compensation shall be paid or allowed by any person, firm, or corporation to any other person, firm, or corporation acting, or assuming to act, as an insurance agent without a license therefor. A duly licensed agent may pay commissions or assign or direct that commissions be paid to a partnership of which the agent is a member, employee, or agent, or to a corporation of which the agent is an officer, employee, or agent. This subdivision does not prevent the payment or receipt of renewal or other deferred commissions to or by any person solely because the person has ceased to hold a license to act as an insurance agent.

Stat. § 60K.14, subd. 3 (1996).

Capitol American acknowledges payment of money to Inter-State, but maintains it was for training. The method by which the money was paid was as a percentage of the commissions earned by each agent trained by Inter-State. There is no basis on which to strike this charge, since the issue of payment of commissions cannot be resolved without making findings on what, in fact, the money was paid for.

The Department alleges in Amended Count XIV that Capitol American failed to provide required notices from two guarantee associations when customers filled out application forms for insurance. The notices are described in paragraph 110 by the statutory citations under which such notices are required. Paragraph 111 indicates that the failure to provide such notices was a routine part of the sales presentation of Capitol American agents from August 1, 1993 (when the requirement took effect), to December, 1996. The basis for the allegation is clear enough. Dismissal of the charge is inappropriate.

Amended Count XV asserts that Capitol American threatened to penalize an agent for contacting a government agency regarding a problem a customer was having with a claim in violation of Minn. Stat. § 72A.20, subd. 20. The Department identified the policyholder, the agent, the date of the letter by the agent to the Department, the language in the letter that suggests that Capitol American is denying claims improperly, the date of the letter from Capitol American's general counsel, and the language in the letter that threatens to "cease paying you commissions" if there are any further charges made against Capitol American. Amended Notice, at 26. There is ample evidence cited to support the charge.

Under Minn. Stat. § 60A.52, the Commissioner is authorized to sanction insurance companies for sanctions taken against them in other jurisdictions, when the Commissioner finds that such sanctions are in the public interest. In the Original Notice, there was no finding that imposing a sanction on Capitol American for sanctions taken under a multi-state consent agreement on March 8, 1995, was in the public interest. That omission was the sole basis on which Capitol American sought to have that charge dismissed. In the Amended Notice, the Department has included a finding that the Order is in the public interest. Amended Notice, at 27 (paragraph 124). There is no basis to dismiss Count XVI.

Count XVII is entirely new and is dissimilar from any other charge in the Original Notice. The charge reads:

Based upon the conduct described in the foregoing 122 paragraphs, Respondent has a board of directors or principal management that is incompetent, untrustworthy or so lacking in insurance company managerial experience as to make its operation hazardous to policyholders, its stockholders, or to the insurance buying public, within the meaning of Minn. Stat. § 60A.052, subd. 1(11) (1996).

Amended Notice, at 27 (paragraph 123).

To some extent, the argument could be made that this charge suffers from the same vagueness that prompted Capitol American's Amended Motion to Strike. However, Amended Count XVII can be proven though a "totality of the circumstances" analysis. The evidence asserted to support the preceding sixteen charges also runs to the seventeenth. Capitol American has sufficient notice of the basis of the allegation to allow for a response. There is no reason to dismiss this charge.

### **Motion to Compel**

The Department's Motion to Compel is brought to require answers to interrogatories served on Capitol American in this matter. The Department's first interrogatories were served in April, 1997, and were comprised of nine questions (1 through 9) and a request for any documents related to the questions asked. Aafedt Affidavit, Exhibit A. Capitol American interposed a general objection to these questions based on a perception that the information sought was beyond the scope of this proceeding. *Id.* The insufficiency of this response was addressed in the First Prehearing Order in this matter, issued on July 2, 1997.

A second set of interrogatories (questions 10 through 28) was served on Capitol American by the Department on May 30, 1997. Aafedt Affidavit, Exhibit A. Capitol American supplemented its responses to the first set of questions and answered the second set by answering many of the questions in summary fashion and asserting that the information sought was in the possession of the Department, and any documents sought were available for inspection at the offices of counsel for Capitol American. *Id.*

A third set of interrogatories (questions 29 through 37) was served on Capitol American by the Department on July 18, 1997. Aafedt Affidavit, Exhibit A. Capitol American responded to the third set in the same manner as the second set.

Regarding the claim that the information sought was available at the offices of counsel, when Department's counsel went to Indianapolis, Indiana, in order to view that information, the documents available were in a number of boxes. Webb Affidavit, at 2. Only a few of the documents were marked. *Id.* The agent files were not organized in any meaningful fashion. *Id.* at 3. Department's counsel were informed that much of what they sought was on a computer system that would print out documents, one at a time and slowly. Webb Affidavit, at 4. That same computer system was unavailable for technical reasons for much of the visit by Department's counsel. *Id.* at 5. The Department asserts that Capitol American has failed to respond to the interrogatories with this inspection.

Minn.R.Civ.P. 33.03 allows a party answering discovery the **option** of allowing inspection of business records if the burden is substantially the same for the party propounding discovery as for the party served, the information can be specified in sufficient detail to allow a person to find what is sought, and a reasonable opportunity is afforded the interrogating party to examine the documents and make copies. The limited number of documents available, the lack of any specification as to the information available, and the nonavailability of the information on the computer compel the conclusion that the Department was not afforded a reasonable opportunity to inspect Capitol American's business records. A second trip to Indiana would be burdensome to the Department and would not assure a reasonable opportunity to inspect the documents identified.

Interrogatory 2 requests the identification of agents trained in Minnesota prior to December, 1996. Capitol American has provided some information regarding agents. The Department objected to the answers provided as not covering the period prior to 1992. Capitol American pointed out that the time period identified in the discovery requests runs from January 1, 1992, to the present, "unless otherwise stated." Department's Request for Production of Documents and Interrogatories (First Set), at 3. The Department claims that "prior to" is stating otherwise within the meaning of the instructions. The Department is bound by its instructions. Requesting information prior to a date after the starting point, without more, means information back to the starting point. There is no basis for compelling discovery of information not asked for.

The Department has asked for the identity, addresses of policyholders and types of policies that have been sold by Capitol American in Minnesota in Interrogatory 3. Capitol American has responded that it sold "limited benefit" policies in Minnesota. This is a nonanswer. Capitol American must specifically identify by name what policy it sold to each policyholder in Minnesota to comply with the interrogatory.

Interrogatory 4 requests the identification of any payments to Inter-State. Respondent answered that the payment information is not available on a state-by-state basis, that a custom computer program would be required to obtain a listing of Minnesota payments, that obtaining the information would be cost prohibitive, and that a protective order would be needed, since the information was sensitive. *Id.*

The Department indicated that it seeks the requested information in any form that reasonably answers the question. If Capitol American cannot provide a breakdown of the payments to Inter-State, then all the information it possesses regarding payments to Inter-State must be provided. If the parties are unable to agree to the form of a nondisclosure agreement, a protective order will be issued to protect Capitol American's proprietary interest in the data.

The Department has indicated that its request regarding Interrogatories 6, 9, 10, 12 and 34 may be resolved informally. The information sought from Capitol American by those interrogatories must either be prepared to adequately respond or an affirmative statement must be made to answer the question propounded by the Department. Since Capitol American has indicated it will provide the requested information, no action will be ordered on the request for that item at this time. Should the information not be provided, the Department will be able to renew its motion on these items by letter.



Interrogatories 15 and 16 sought a listing of all policyholders residing in Minnesota who received claim denials and an explanation of the reason for each denial. Capitol American produced a list that had the policy number and a code representing a reason for denial. Capitol American was not able to identify what all of its codes meant and whether any of the codes were used for other reasons. The policy numbers could be cross-referenced with the lists of policyholders to obtain the name of the policyholder.

Capitol American did not produce any of the documents it maintains in its claim files to respond to Interrogatories 15 and 16. Each of these files contains a copy of the letter sent to the policyholder either granting or denying the claim. Where claims were denied, reasons are set out. Capitol American maintains that it is not obligated to submit any more information than what was asked for. This argument overlooks the document request that accompanies each set of interrogatories. That request requires submission of every document "which would serve in whole or in part to substantiate any of your answers . . . ." Aafedt Affidavit, Exhibit A, Second Request at 8. The claim denial letters clearly fall within the scope of the Request for Documents. These letters are more important to properly answer the questions asked since the response provided does not itself contain the information sought. To the extent that Capitol American cannot identify all the codes used on the list provided, the answer is incomplete. There is some indication that Capitol American will be providing 100 claim denial letters from these files to partially answer these interrogatories. To ensure compliance, provision of those letters is hereby ordered. The opportunity to obtain more of the information sought from these files will remain open.

Interrogatory 17 requests all marketing materials used for selling insurance in Minnesota from January 1, 1992 through December, 1996. Capitol American supplied the sales scripts used by agents to reply to this interrogatory and claimed that the term "marketing materials" was vague. In light of the Amended Notice, the request clearly runs to all advertising, promotional materials, mailings and any other thing used to sell Compcare in Minnesota. Capitol American must submit this information to adequately respond to the Department's interrogatories.

Interrogatories 19 and 20 ask for sales and marketing reports prepared by Interstate for Capitol American on a periodic basis. Capitol American has denied that any such reports exist. Aafedt Affidavit, Exhibit A, Response to Second Set, at 8. The Department has identified hot sheets, payment schedules, and commission schedules that fall within the years at issue in this matter. Aafedt Letter, at 2. Capitol American's response is insufficient. The requested information must be provided and if it cannot be found, an explanation must be provided as set out in the interrogatory instructions. Capitol American might consider inquiring of Interstate for any clarification it needs as to what documents were prepared and perhaps obtaining copies.

Capitol American maintains that it complied with Interrogatory 22 by providing the policyholder listings. By cross-referencing, Capitol American asserts, the Department can find the information it seeks. This approach reverses the burden of discovery and defeats its purpose. Capitol American is required to provide the information asked for, not provide pieces of information that may or may not amount to the discovery

requested. The Department is entitled to a list that Capitol American certifies is **the** list of complaints.

Interrogatories 29 and 30 seek information on agents that is broader than the agent training question in Interrogatory 2. Capitol American has failed to make its agent files reasonably available to the Department. Capitol American must comply with the requests by providing the information sought, in whatever format can be used by the Department. If the information only contained in image files can be accessed by the Department, copies of those computer files can meet Capitol American's obligation. Otherwise, Capitol American must provide paper copies of the agent files requested.

Interrogatories 31 and 33 request the names and positions of various officers and employees of Capitol American. There is no good reason for not having complied with these requests. Capitol American must submit the information requested.

As a general matter, the Department objects to the manner in which the interrogatories have been answered since they have been signed by Lisa Buoy, Legal Assistant. There is no indication as to who employs Ms. Buoy or the extent to which she has access to the information requested. Minn.R.Civ.P. 33.01(d) expressly requires answers to interrogations from corporations to be signed by an "officer or managing agent." None of the answers submitted by Capitol American have complied with the standards set in Minn.R.Civ.P. 33.01(d). All responses to the Department's discovery filed after the date of this Order shall comply with the applicable rule standards.

S.M.M.